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IN THE

SUPREME COURT OF THE UNITED STATES

No. 80-472

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner

vs

JAMES SAMUEL SIMS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Samuel Sims, respectfully asks leave to file the attached Brief in Opposition to a Writ of Certiorari to the United States Supreme Court and to proceed in forma pauperis pursuant to Rule 46 of the United States Supreme Court Rules of Procedure.

Said leave to proceed in forma pauperis was sought in the United States District Court for the Northern District of Ohio in Sims v. Engle, Civil Action No. C-78-1302 (1979) and in the United States Court of Appeals for the Sixth Circuit in Sims v. Engle, 619 F.2d 598 (6th Cir. 1980); and Said leave to proceed in forma pauperis being granted in both courts.

Respectfully submitted,

Michael Chaim Hennenberg

MICHAEL CHAIM HENNENBERG)

SERVICE

I hereby certify that a copy of the foregoing was mailed to Richard David Drake, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 24th day of November, 1980.

Michael Chaim Hennenberg

Counsel for Respondent

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October Term, 1980

No. 80-472

TED ENGLE, Superintendent
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Petitioner

v.

JAMES SAMUEL SIMS

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit and order denying rehearing are reported as Sims v. Engle, 619 F.2d 598 (6th Cir. 1980). The decision of the United States District Court for the Northern District of Ohio, Eastern Division is unreported. The decision of the Ohio Court of Appeals for the Eighth Judicial District is reported as State v. Sims, 55 Ohio App. 2d 285 (1977).

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 17, 1980. Rehearing was denied on June 26, 1980. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment V to the Constitution prohibiting double jeopardy

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

made applicable to the states by Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code §2151.26 (as effective in 1962)

Child charged with felony

> In any case involving a delinquent child under sections 2151.01 to 2151.54, inclusive, of the Revised Code, who has committed an act which could be a felony if committed by an adult, the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case.

Case No. 80-472

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TED ENGLE, Superintendent
Chillicothe Correctional Institute

Petitioner

vs

JAMES SAMUEL SIMS

Respondent

STATEMENT OF THE CASE

Respondent accedes to the Petitioner's Statement of the Case excepting only to the factual misrepresentation made on Page 6 of the Petition for Writ of Certiorari to the effect that this Supreme Court is petitioned to review a decision of the Sixth Circuit Court of Appeals in which the Court of Appeals held "it would be presumed" that a violation of the prohibition against double jeopardy occurred in the prosecutions against the Respondent, James Samuel Sims.

The Sixth Circuit held that absent evidence to the contrary, it must presume that state court proceedings against the Respondent were regular and valid. Finding that there was no evidence produced by the Petitioner to establish that the Juvenile Court proceedings of March 27, 1962 against Respondent under Ohio R.C. §2151.26 deviated from statutory mandate, it held, as a matter of Ohio law, that Respondent was first placed in jeopardy in that 1962 appearance before the Cuyahoga County Juvenile Court and that subsequently Respondent was again placed in jeopardy by further prosecution for the same offense in the Cuyahoga County Court of Common Pleas resulting in his felony conviction and imprisonment.

On these grounds the Court of Appeals found the Respondent's conviction was entered in violation of the Fifth Amendment's prohibition against double jeopardy and remanded to the district court for issuance of the Writ of Habeas Corpus. Sims v. Engle, 619 F.2d 598 (6th Cir. 1980).

ARGUMENT IN SUPPORT OF OPPOSITION OF GRANTING CERTIORARI

The Petitioner, Ohio state prison superintendent, overstates when he characterizes this case as presenting "an important issue of constitutional law." Conspicuous by its absence in Petitioner's brief, however, is any citation whatsoever to any provision of the federal constitution to support the Petitioner's claim that this case warrants review by this Honorable Court. The Petitioner argues "certiorari should be granted in order to resolve this issue of national importance". The dispositive issue in this case is, in fact, the sufficiency of the Respondent's evidence supporting his application for a Writ of Habeas Corpus. Petitioner does not explain how or why this evidentiary question has risen to an issue of national importance.

Petitioner describes the question presented as "regarding the allocation of the burden of proof in a federal habeas corpus proceeding" under 28 U.S.C. §2254, but in truth, there is no dispute in this case. Unquestionably, Respondent, James Samuel Sims, who made application for habeas corpus relief in the federal district court, bore the burden to prove his entitlement to the writ. The Respondent met his burden of proof in the district court and on appeal, the Sixth Circuit Court of Appeals so held and directed the district court to issue the writ.

The Petitioner asks this Honorable Court to review this case because Petitioner disputes that Respondent produced sufficient evidence to warrant relief on Respondent's claim that the multiple proceedings against him violated the prohibition against double jeopardy of the fifth amendment to the United States Constitution.

Petitioner asks in his statement of the question presented for review whether a violation of double jeopardy can be presumed by a federal court entertaining a state prisoner's application for habeas corpus relief. The petitioner's statement of the question presented exposes the Petitioner's fundamental confusion about the role legal presumptions played in this litigation. This case does not involve the use of such an extraordinary presumption as presuming a violation of the prohibition against double jeopardy.

The lower federal court in this case did not take the extraordinary measure of presuming a violation of double jeopardy; rather, it applied the long standing, quite unremarkable rule that absent evidence to the contrary, the regularity of state court proceedings must be presumed.

The Petitioner seems not to understand--or perhaps not to accept--the analysis employed by the Sixth Circuit in arriving at its holding that the record on appeal--the same record before the district court when it denied the writ for habeas relief--was legally sufficient to establish that Respondent James Samuel Sims was twice put to jeopardy for the criminal offenses charged against him. The Petitioner argues that the applicant for federal habeas corpus must bring forth competent evidence to prove his entitlement for relief. The Respondent has no quarrel with that proposition but takes exception to the Petitioner's suggestion that that proof must necessarily take one prescribed form to the exclusion of all other means of proof.

Petitioner puts great emphasis on the fact that no verbatim record or transcript of proceedings of the Respondent's March ,1962 appearance in the Juvenile Court was before the district court or before the Sixth Circuit on appeal. Therefore, the Petitioner reasons, a court

could not conclude that the juvenile court proceedings against Respondent were adjudicatory in nature and hence proceedings in which jeopardy attached. Indeed no transcript was made of the Respondent's Juvenile Court proceedings and consequently it was impossible for Respondent to bring forward a transcript of the Juvenile Court hearing which would disclose the evidence taken and its adjudicatory nature affirmatively upon the record.

The Petitioner would end the analysis at just this point--there is no verbatim transcript of the Juvenile Court proceedings against Respondent affirmatively showing that the hearing was in fact adjudicatory, and without a full transcript the Respondent could not have proved his claim that he was first put in jeopardy in the Juvenile Court and later put in jeopardy in the Common Pleas Court for the same criminal charges. Were the analysis to end at this point, then clearly denial of an individual's constitutional rights would be as simple as denying the accused a court reporter to transcribe the proceedings against him. Courts would be powerless to enforce constitutional rights because it would be impossible during later judicial review to detect their violation! We would have then unwittingly developed an absolute, "no record, no review" rule.

The Sixth Circuit recognized that the fact that no transcript of proceedings was made of Respondent's appearance in the Juvenile Court was not necessarily the end of the analysis. The Sixth Circuit's analysis went on to ask whether the Juvenile Court proceeding could have been adjudicatory? And, since the proceeding in Juvenile Court against Sims was conducted under authority of Ohio R.C. §2151.26, the Sixth Circuit as a matter of state law was compelled to conclude that, indeed, it could

have been an adjudicatory hearing. This conclusion was compelled because R.C. §2151.26, the governing statute, did not statutorily limit the scope of the Juvenile Court's proceedings against the charged juvenile to merely a probable cause determination or a preliminary hearing. And, nothing on the face of the record, in particularly nothing in the Juvenile Court's journal entry of March 27, 1962, announces that in fact only a probable cause or preliminary hearing was had prior to that Court's decision to bind over the child, James Samuel Sims, to the Cuyahoga County Common Pleas Court for indictment on certain felony offenses. Because these proceedings could have been adjudicatory in nature, these proceedings could have been the first of two proceedings in which Sims was placed in jeopardy for the same criminal charges. Breed v. Jones, 421 U.S. 519 (1975).

At this point the Sixth Circuit's analysis implicitly recognizes that there are only two choices--either the court presumes that the Juvenile Court hearing against Sims was adjudicatory, that is, evidence was taken and findings on Sims' delinquency made on the evidence; or, the court presums that the proceedings were limited to a probable cause or preliminary hearing on the delinquency charges lodged against Sims. Because it must necessarily choose between two presumptions of what took place in the absence of a transcript or other complete record affirmatively displaying the true nature of the proceedings, the Sixth Circuit succinctly points out: "What actually occurred at the March 27, 1962 hearing is also insignificant." Sims v. Engle, 619 F.2d at 605.

Looking to applicable state law, the Sixth Circuit had no difficulty determining which of the two presumptions was correct--indeed, compelled as a matter of law. So it is that Respondent respectfully contends that this case involves nothing more than the application of an Ohio statute, R.C. §2151.26, and its unambiguous interpretation by the Supreme Court of Ohio to James Samuel Sim's March 27, 1962 appearance before the Juvenile Court.

The Sixth Circuit held that as a matter of Ohio law, a juvenile court proceeding conducted under R.C. §2151.26 was adjudicatory and therefore Respondent Sims was first placed in jeopardy at his March 27, 1962 Juvenile Court bindover hearing. Federal courts are bound to follow the interpretation of state statutes by the highest court of the State, Wardius v. Oregon, 412 U.S. 470, 477 (1973), and in the appeal below, the Sixth Circuit predicated its decision on the interpretation of Ohio R.C. §2151.26 by the Ohio Supreme Court in In Re Jackson, 21 Ohio St.2d 215 (1970).

In Jackson, the Ohio Supreme Court held that R.C. §2151.26 required juvenile court to first make a finding of delinquency before entering an order to bindover a juvenile to the jurisdiction of the Common Pleas Court for further proceedings:

> We agree...that as conditions precedent to binding over a juvenile to the Court of Common Pleas, the Juvenile Court must find that the child is in fact delinquent...

Id. at 218 (Emphasis added).

Not "probably delinquent", but "in fact delinquent."

The Jackson holding was not formulating new procedure; it followed the analysis delineated in the dissenting opinion to State v. Worden, 162 Ohio St. 493 (1955) (dissenting on other grounds), which maintained that a finding of

delinquency was required prior to bindover:

> Then, under Section 2151.26 provided such juvenile is found to be a delinquent the juvenile judge may order him to appear before the Court of Common Pleas. But, first, the juvenile must be found to be delinquent. And this can only be done after a hearing.

Id. at 598 (emphasis added).

By requiring Ohio juvenile courts in hearings under R.C. §2151.26 to made a factual finding of delinquency as a condition precedent to bindover--and by not limiting these proceedings to probable cause or preliminary hearings, the Ohio Supreme Court in Worden and Jackson in effect mandated juvenile court delinquency hearings in which jeopardy would attach. As a result, subsequent proceedings against the juvenile after his bindover to the Common Pleas Court would, under the principles of Breed v. Jones, supra, violate the constitutional prohibition against double jeopardy.

In Breed v. Jones, this Honorable Court held:

> [Jeopardy attaches]at a proceeding whose object is to determine whether [a juvenile] has committed acts that violate a criminal law.

421 U.S. at 529.

The Sixth Circuit recognized that this was precisely the practical effect of the Ohio Supreme Court's interpretation of R.C. §2151.26 in In Re Jackson:

> Once the Juvenile Court possessing the jurisdiction and power to enter final orders levying a wide range of possible sanctions, began a hearing, jeopardy attached and the appellant possessed the constitutional right to have the Juvenile Court as the original trier of fact determine his fate.

Sims v. Engle, 619 F.2d at 605 (citations omitted). That the Worden and Jackson decisions did not have the benefit of the teachings of this Court in Breed v. Jones

does not convert the adjudicatory, R.C. §2151.26 proceeding against Respondent into a proceeding in which jeopardy did not attach. Due to the nature of the constitutional interest involved, this Court expressly declared Breed v. Jones to have retroactive application. The Breed v. Jones holding unquestionably applies to review of Respondent's 1962 Juvenile Court hearing and resulting Common Pleas Court conviction.

The Petitioner protests the conclusion that Respondent's juvenile Court hearing was adjudicatory claiming that at the time of the Respondent's 1962 bindover proceeding no unified practice existed in the Juvenile Courts of Ohio. In other words Petitioner contends the Sixth Circuit should have questioned whether the Juvenile Court really made the adjudication which R.C. §2151.26 required it to make.

The Sixth Circuit properly answered this contention by noting that in hearing Respondent's application for habeas corpus:

> The district court took no evidence on the existence of a customary practice in the Cuyahoga Juvenile Court divergent from the statutory requirements. The statutory provisions are straight forward and the requirement made clear by the Jackson decision was known before 1962. State v. Wordon, 162 Ohio St. 593 (1955) (dissenting opinion, dissenting on other grounds).

Sims v. Engle, 619 F.2d at 605 n. 10 (emphasis added).

The burden of producing evidence on this claim was squarely on the Petitioner's shoulders but none was brought forward. Accordingly, Respondent had no burden to counter or disprove this claim on which no evidence was introduced in the trial court.

Further, the Sixth Circuit answered, the law does not presume irregularity in court proceedings. Absent evidence to the contrary,

> ...state court proceedings are presumed to be regular and valid, State v. Ray, 102 Ohio App.2d 395, 397, 142 N.E.2d 484 (Ct. App. 1956)....

Id. at 605 n. 10.

Regular and valid proceedings for an Ohio Juvenile Court conducting a hearing under R.C. §2151.26 in 1962 would necessarily include an evidentiary hearing on the issue of whether the child had committed acts which could be a felony if committed by an adult and a finding of delinquency prior to entering an order binding over the child to the jurisdiction of the Common Pleas Court for further prosecution. R.C. §2151.26; In re Jackson, supra.

There is no question that Respondent Sims was bound over to the Common Pleas Court as a result of his Juvenile Court hearing under R.C. §2151.26 and that subsequently he was convicted on the same charges upon which he was previously adjudicated to be a delinquent child.

The Petitioner points to no part of the Juvenile Court's March 27, 1962 Journal Entry--the only surviving record of what occurred that date to the child, James Samuel Sims--as giving any indication of any departure whatsoever by the Cuyahoga County Juvenile Court from the statutory requirements set forth in R.C. §2151.26 or from the interpretation of those statutory requirements in State v. Worden, supra, and In Re Jackson, supra.

Petitioner does question whether the Juvenile Court did in fact find Respondent Sims to be delinquent. This is immaterial. In Swisher v. Brady, 438 U.S. 204 (1978), this Supreme Court held that jeopardy attaches prior to

the final judgment of the court. See also, Arizona v. Washington, 434 U.S. 497, 503 (1978); McGaha v. Tennessee, 461 F. Supp. 360 (E.D. Tenn. 1978) (Where jurisdiction of juvenile court was strictly limited by statute to probable cause hearing, jeopardy did not attach to such proceeding).

Petitioner asks this Court to grant certiorari in this case to speculate on the nature of the March 27, 1962 hearing based on the Juvenile Court's statement in its Journal Entry

> It appearing to the Court that said child had committed acts, which, if committed by an adult would be felonies....

The Sixth Circuit refused to speculate on this statement but in a footnote admitted these words were more indicative of an adjudicatory hearing than a probable cause or preliminary hearing:

> Were we compelled to interpret the Juvenile Court's journal entry order, in particular the phrase "It appearing to the Court that said child has committed an act" we would hold the Juvenile Court did make a finding of fact of Sims' guilt.

Sims v. Engle, 619 F.2d at 605 n. 12.

What else could "it appearing to the court" mean?

It does not surpass Respondent's attention that Petitioner suggests to this Court that the Sixth Circuit erred in refusing to remand this case to the district court with instructions to conduct an evidentiary hearing on the issue of Ohio Juvenile Court practice under R.C. §2151.26 in 1962. Respondent questions the relevancy any determination on that issue would have to the ultimate issue of whether Respondent was placed in jeopardy at the Cuyahoga County Juvenile Court hearing on March 27, 1962. Additionally,

Respondent respectfully submits the Petitioner's request for rehearing and for a remand simply asks for a second chance to prove its defense to Respondent's claim for relief under federal habeas corpus. The Petitioner received his day in court and now wants "a second bite of the apple."

Petitioner even poses an unleashing of the floodgates argument: the Sixth Circuit's holding may result in the release of all juvenile felons bound over for trial under Ohio R.C. §2151.26. Does Petitioner seriously argue that should the State of Ohio violate many persons' fifth amendment rights in the same fashion, this Court should reward the State by denying relief to each individual who raises that violation on application for a Writ of Habeas Corpus?

CONCLUSION

The Respondent respectfully contends that the Sixth Circuit correctly applied settled principles of state and federal law to the facts as it found them in the record to reach the proper decision that jeopardy had, in fact, attached at the March 27, 1962 juvenile court proceedings:

1. The juvenile court bindover proceeding was governed by Ohio R.C. §2151.26.

2. Federal courts follow the interpretation of state legislation by the highest court of the State. Wardius v. Oregon, supra.

3. Ohio R.C. §2151.26 was interpreted by the Ohio Supreme Court to require a finding of delinquency prior to bindover. In Re Jackson, supra; State v. Wordon, supra.

4. Jeopardy attaches at a juvenile court proceeding when the juvenile court is not limited in scope by statute to a preliminary hearing or probable cause hearing and the juvenile court makes findings of fact as to the juvenile's offenses to determine whether said acts would be felonies if the juvenile was an adult. Breed v. Jones, supra; Swisher v. Brady, supra; Arizona v. Washington, supra. The juvenile court on March 27, 1962 was not limited in scope to only conduct preliminary hearing or a probable cause hearing, and moreover made a finding of fact concerning the Respondent's offense prior to bindover.

5. A presumption of regularity attaches to state court proceedings in the absence of evidence to the contrary. State v. Ray, 102 Ohio App.2d 395, 142 N.E. 2d 484 (1956); see also, Beach v. Sweeney, 167 Ohio St. 477 (1958).

6. The petitioner failed to rebut the presumption of regularity.

7. Therefore the Writ of Habeas Corpus must issue.

For all the reasons stated herein, the Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL CHAIM HENNENBERG

JANET R. BURNSIDE
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition to Writ of Certiorari have been served on Petitioner, Ted Engle, Superintendent Chillicothe Correctional Institute, by forwarding such copies through the office of the Assistant Attorney General, Richard David Drake, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 24th day of November, 1980. I further certify that all parties required to be served have been so served.

MICHAEL CHAIM HENNENBERG
Counsel for Respondent